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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

NO. 669

JOHN N. MINNICH, Petitioner,

v.

RUSSELL GARDNER et al., Intervening Creditors, and D. C. REILEY, ESQ., Trustee of King Motor Co., Bankrupt, Respondents.

BRIEF FOR ARGUMENT OF RUSSELL GARDNER ET AL., RESPONDENTS.

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BRIEF FOR ARGUMENT OF RUSSELL GARDNER ET AL., RESPONDENTS.

COUNTER-STATEMENT OF THE CASE.

Minnich, the petitioner, in this bankruptcy proceeding asserted a lien of $1776.17 against a fund of money in the hands of the trustee in bankruptcy (see Page 12 of petitioner's brief). The Circuit Court of Appeals (affirming the District Court for the Western District of Pennsylvania) has denied his asserted lien (see Opinion of Justice Thompson, R. Page 51). This brief is filed on behalf of Russell Gardner and others, labor claimants, holding admittedly valid and allowed priority claims, they having been appellees of record in the Circuit Court of Appeals. They are parties in interest be-

cause they will suffer, on distribution, if the alleged lien be allowed (R. Page 22).

The said fund was realized by the bankruptcy trustee from the sale of the personal property of the bankrupt in its garage at Bedford, Pennsylvania (R. Pages 16 and 17).

The alleged lien of petitioner was asserted as follows: That on March 26, 1929, which was almost 18 months before the bankruptcy petition (August 30, 1930), he as plaintiff had caused two writs of execution against the bankrupt to issue out of the Common Pleas Court of Bedford County, Pennsylvania, returnable to the third Monday of the following month (Page 1 of Petition). On said writs, levies were made on the said personal property in March, 1929, and the Sheriff made return "Goods on Hand Not Sold." At the time those writs were issued, and steadily thereafter during the seventeen or eighteen months period and until its bankruptcy, which occurred at the end of that period, the King Motor Company, the defendant in the writs (who is the bankrupt here), was a corporation engaged in the operation of an automobile accessory business and garage in Bedford. Notwithstanding the return aforesaid and the levy made by the Sheriff (R. Page 28), the goods in the defendant's (now bankrupt's) place of business were allowed to remain there for the next eighteen months and the defendant continued in business until the State Court receivership (which preceded the bankruptcy by a few days) hereinafter mentioned. During the said period and following the two said writs of execution, the plaintiff (petitioner herein) has caused to issue thereon from time to time thereafter a number (R. Page 36, *et seq.*) of writs of *vend. ex.* The petitioner herein concedes (Page 2 of petitioner's brief) that the writs of *vend. ex.* created no new rights or liens, under the Penn-

sylvania rule. After these various writs of *vend. ex.* had been issued (R. Page 12), on August 21, 1930, Minnich, the said plaintiff, petitioner herein, gave some kind of direction in writing to the Sheriff that the Sheriff must advertise the goods taken in the levy of March 26 of the previous year (R. Page 15), and at the same time, that is to say, on August 21, 1930, Minnich caused a new clause of execution to be attached to the third pluries *vend. ex.* writs, which at that time were his current writs. It is admitted that on the date last aforesaid, the defendant, now bankrupt, was insolvent (Petition, Page 3, Par. 5). On August 25, 1930 (R. Page 15) in a Common Pleas Court proceeding in Bedford County, a receiver was appointed for the defendant, King Motor Company, now bankrupt; the bankruptcy petition against it was filed five days later (R. Page 1).

As we understand, the petitioner asserts $1776.17 to be the value, in dollars, of this lien based on the two writs (Page 4 of Petition).

ARGUMENT.

The petitioner asserts here a lien based on a writ of a Pennsylvania Court. The validity of that lien will be tested, therefore, by the Pennsylvania rules applicable to such writs. See *Hiscock v. Varick Bank of N. Y.*, 206 U. S. 28, 18 A. B. R. 1. So much was conceded by the petitioner herein on Page 9 of the printed brief filed of record by him in the Circuit Court of Appeals, from which we quote as follows:

> "By decisions so well settled, as not to require citation, the law of Pennsylvania will govern as to liens created under judgments and writs of its Courts."

That the Circuit Court of Appeals in the case at bar reached its decision by applying, to the facts, a clearly established Pennsylvania rule, can be demonstrated without great difficulty.

In Pennsylvania, the Appellate Courts have been firmly committed to the principle that, where the rights of other creditors are in any way concerned, a presumption of fraud arises against an execution plaintiff who fails or refuses promptly to proceed to sale on his writ, although the presumption may be rebutted. Justice Thompson, in the Opinion (Record, Page 52) of the Circuit Court of Appeals in the case at bar, quoting from the Opinion of the Supreme Court of Pennsylvania, in *Platt-Barber Co. v. Groves*, 193 Pa. 475 (decided in 1899) said:

> "'The rule is well established that an execution which is not put in the sheriff's hands with the bona fide intention of collecting the debt, but merely to be held as a security, or to prevent other creditors from coming upon the debtor's goods, is fraudulent as to them, and will be postponed to subsequent levies. And stay, or unusual delay of the proceedings, allowing the debtor to sell or otherwise to deal with the goods in contravention of the levy, and other acts of similar nature, give rise to a presumption of want of good faith: *Dorrance's Admr. v. Com.*, 13 Pa. 159; *Earl's Appeal*, 13 Pa. 483; *Freeburger's Appeal*, 40 Pa. 244.'"

Further, from the Opinion of Justice Thompson in the Circuit Court of Appeals, in the case at bar, page 53 of Record, we quote:

> "Under the facts, we reach the conclusion that the appellant, the lien claimant here, made his levy solely for the purpose of acquiring a lien and with-

out a genuine intention of proceeding promptly for the collection of his debt. He postponed all action until such time as the debtor was obviously insolvent and within four months of the bankruptcy. He has not met the test of good faith and has therefore failed to establish liens upon the fund."

Petitioner herein has in effect admitted: that being sufficiently close to the bankrupt's (defendant's) affairs to enable him to say he was very well acquainted with its books (R. 30), for approximately eighteen months following the levies he allowed the bankrupt's place of business to remain open, and suffered and permitted the property levied upon to be openly sold and offered for sale in the usual course of defendant's business (R. 31) (Testimony Mr. King, R. 28).

In other words, in rejecting the petitioner's alleged and fantastic lien, all that the Circuit Court of Appeals did in the case at bar was to apply, to the rather peculiar facts existing here, and recited in the Opinion of Justice Thompson, Page 52, Record, the well understood Pennsylvania principle relating to dilatory execution plaintiffs. And that principle—we may add—had been applied so recently as 1929 by the Superior Court of Pennsylvania in *Raskin v. Nasow*, 97 Pa. Super. 281.

We might add also that while it is true various States apply different tests, this Pennsylvania test of good faith is not a strange or peculiar one; it is used in some other States, also.

Our adversary cites *Freeman on Executions* in an effort to support his rather obscure position, but that writer, at Page 591, Section 206 of his text book, states that the general proposition is that so long as the writ is not executed in good faith, there is no lien; and in

that Section, Freeman suggests that various States—construing their particular statutes and rules—have held differently on similar sets of facts. And we cannot refrain from suggesting that from the quotation hereinafter set forth, it would seem that the text book writer Freeman is clearly in agreement with the Circuit Court of Appeals; that Court, as we have said, found from the admitted facts that there was a clear showing of legal fraud, which had not been rebutted. From *Freeman on Executions*, Vol. 1, Page 589, Section 206, we quote:

> "An execution, when delivered to an officer, is presumed to have been delivered for service. This presumption may, as we have shown, be rebutted by proving that the delivery was accompanied by directions staying the execution of the writ. In many instances the existence of such directions cannot be established by direct proof, and yet the manner in which the officer has conducted himself, and the lenity with which the plaintiff has viewed such conduct, indicate that the directions must have been given, or that by some means the officer and the plaintiff must have come to a mutual understanding to delay the execution of the writ."

From Page 2 of the Petition in the case at bar, we quote the following concession of petitioner:

> "It is conceded, however, that under the law of Pennsylvania on account of the delay of almost seventeen months, apparently acquiesced in by the petitioner, the execution became dormant, and the lien would have been postponed to other executions subsequently issued while the dormancy continued."

We will take up the several arguments in the Brief filed here by petitioner, as follows:

I.

He says (Page 13 of petitioner's brief):

> "Under the Law of Pennsylvania, the Petitioner's Lien, if the Levy Was Made Solely for the Purpose of Acquiring a Lien and Without a Genuine Intention of Proceeding Promptly With the Collection of His Debt, Was Good as Against the Defendant in the Execution from the Date of the Issuing of the Execution to the Date of the Filing the Petition in Bankruptcy."

That argument, we submit, is wholly without point in this case. Petitioner is here claiming a lien against a fund in the hands of a bankruptcy trustee. The bankruptcy petition and the adjudication in bankruptcy had the effect of an "attachment and injunction" under the clearly defined rules of law: see *Acme v. Beetman*, 222 U. S. 300. The Trustee in Bankruptcy, as to the property which has come into his hands, has the status of a lien creditor; see Section 47 (a) (2) of the bankruptcy statute, printed at Page 16 of this Brief; see *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 36 A. B. R. 754; *Hoyes v. Gibson*, 279 Fed. 812 (C. C. A. Del.); *Bilyu v. Lester*, 281 Fed. 310 (C. C. A. Pa.); *In re Press Printers & Publishers* (C. C. A. N. J. 1927), 23 Fed. (2d) 34.

At Page 16 of his Brief, petitioner cites the late Pennsylvania case of *Geha v. Baltimore Life Insurance Co.*, 168 A. 527, at 528, and quotes one sentence from the Opinion of the Court there. That sentence, divorced from its context, would seem to give some color to petitioner's argument, but an inspection of the Opinion in that case shows that it involves the rights of an execution creditor in a controversy concerning a supersedeas

growing out of an appeal to the Superior Court of Pennsylvania; the question involved in that case has not the faintest resemblance to the question in the case at bar.

2.

His second argument (Page 17 of Petitioner's Brief) is about the same as his first. In the face of the statute and decisions, he insists that the bankrupt estate is not in the position of a lien creditor.

3.

His third argument (Page 18 of his Brief) starts out with what seems to be an admission of a "perversion of the writ," but proceeds to contend that because on August 21, 1930 (nine days before the bankruptcy) he gave the Sheriff new directions to sell, that those new directions enable him to date his lien, not from the day of those new directions—which would do him no good—but from the day of levy, seventeen or eighteen months before.

As we have said, it would do petitioner no good to assert his lien as of that August day (nine days before the bankruptcy) because then admittedly the bankrupt was insolvent (Par. 5 of Petition, Page 3) and the lien would, therefore, be bad under Section 67f of the bankruptcy statute, printed at Page 16 hereof.

This admittedly is a Pennsylvania question, but appellant cites no Pennsylvania appellate case, to support his theory that his August 21, 1930 directions to the Sheriff would enable him to date his lien back to March, 1929. But at Page 18 of his Brief, petitioner does pull two sentences from the Philadelphia Common Pleas case of *Deacon v. Govett,* 4 Phila. 7. Because it is possible

that those two sentences, standing alone, may convey an entirely erroneous impression of what the Court did hold in that case, we print the entire Opinion, as follows (Italics are ours):

> "Sharswood, P. J.—Upon the question of priority between execution-creditors, where the first execution-creditor has instructed the Sheriff not to proceed, or has given no instructions, the cases are legion—a volume might be written to reconcile them. We think, however, that one thing is or ought to be clear, that whatever *laches* an execution-creditor may have been guilty of, if, before any subsequent execution has come to the hands of the Sheriff, he wakes up and orders the Sheriff to proceed, he is safe. *He ought to be be in no worse position, than if he had taken out no execution at all, until he gave the order. Earl's Appeal, 1 Har. 483, is very much like this case, but is wanting in the important element, as we consider, of the absolute order to the Sheriff to proceed before the second execution came to hand. As between the first execution-creditor and the defendant, defendant's selling goods and receiving the proceeds was no payment, and the second execution-creditor had then no lien and had no right to object. When the new order was given, it should be regarded as though an execution were then first levied, and if nobody had then yet got before him, the plaintiff in that execution ought to have the money.*" (The italicised sentences are those which petitioner did not quote.)

We submit that clearly the said Philadelphia Opinion, cited by petitioner, would kill the petitioner's theory here. Following that Opinion, the petitioner here would have a lien as of August 21, 1930, which date, as we have

said—and which petitioner will admit—would be too late by reason of Sec. 67f. Likewise petitioner's citation from *Corpus Juris* (Page 18) to the effect that his new instructions gave him "priority from the time the instructions were given," would also destroy his theory, for the same reason. Therefore, it is probably unnecessary for Your Honors to rule whether the Philadelphia case, aforesaid, or *Corpus Juris*, accurately reflect the Pennsylvania view as to the effect of new directions to a Sheriff; because, if they do, the petitioner is in just as bad position in this case as he would be otherwise.

And, as we have stated, the Circuit Court of Appeals in the case at bar followed the established Pennsylvania principle, which makes good faith the test of validity of writs.

From *Dunham v. Rundle*, 4 Pa. Super. 174, 180 (1897), we quote:

> "The law does not favor an execution for the mere purposes of lien. The ground on which an execution may be postponed to a subsequent levy is that the prior one is not used in good faith for its legal purpose, but in fraud of the rights of the other creditors. The law is thus stated in *Corlies v. Stanbridge*, 5 R. 286: 'If the plaintiff delivers an execution to the Sheriff with direction not to levy at all or not until further orders, it creates no lien upon the defendant's personal property as against a creditor issuing or proceeding with a subsequent execution. The rule is the same if there is a levy accompanied with instructions to stay proceedings. In both cases the plaintiff's object is considered to be to obtain security, not satisfaction for his debt, and the employment of an execution for

this purpose is a perversion of its design and a fraud against third persons:' *Broadhead v. Cornman,* 171 Pa. 322."

A few other States, we will concede, apply different tests for their writs, but how does that concern us? And how are we concerned with the several Federal cases cited by petitioner and each of which construes the statutory or decisional rules as to executions in various States? These Federal cases which at this branch of the case our adversary cites, are outside of Pennsylvania, and in each of them, as we have said, the Court construes the statutes of some particular State; for example, in the *Gulfport Furniture Co.* case, 1 Fed. Supp. 489, cited by our adversary, the Opinion is clearly based upon the particular provisions of the Mississippi code. Another late case which our adversary did not cite but which reached the opposite conclusion from that in the Gulfport case, is *In re Yahya,* (apparently not in Federal Reporter), 18 A. B. R. (N. S.) 490, in which the District Court of Ohio, construing the Ohio code, held that the dilatory execution creditor had lost his lien. We repeat, therefore, that there is no point to the citation of authorities outside Pennsylvania for the purpose attempted by our adversary here.

4.

Petitioner's fourth argument (Page 21) is that bankruptcy does not avoid liens created more than four months prior to bankruptcy.

With that abstract proposition we have no quarrel; but, as we have said, the proposition has no application to the facts of this case. And, in answer to the citations set out at Pages 22 to 24 of his brief, we repeat: the Pennsylvania test is "good faith," and decisions outside Pennsylvania, applying other tests, do not concern us.

5.

The argument that the decision of the Circuit Court of Appeals is contrary to applicable local decisions (Page 24 of Petitioner's Brief) has already been answered by us.

6.

Petitioner argues (Page 25) that the decision here is in conflict with decisions in other Circuits. We repeat, that the question—as petitioner expressly conceded in his printed Brief in the Circuit Court of Appeals—is one to be determined by Pennsylvania law: that under the Pennsylvania law his alleged lien was worthless, as against any subsequent execution and therefore as against the bankrupt estate.

7.

We cannot refrain from adding the following:

The adjudication by the District Court and the Circuit Court of Appeals that the alleged lien of the petitioner herein—tested by the good faith requirement of the Pennsylvania law—was wholly bad, made it unnecessary for those Courts to consider our secondary proposition. That secondary proposition was this: here the trustee in bankruptcy has a fund which is not sufficient to pay in full the admitted and allowed priority claims for wages, and petitioner, by asserting his alleged lien, is endeavoring further to decrease that fund to the extent that his lien would be allowed. His alleged lien is based on his writ of execution issued out of the Pennsylvania court and on that part of Section 64 of the bankruptcy statute which gives priority to debts owing to any person who by the laws of the State is entitled to priority. But, if the District Court and the Circuit

Court of Appeals had held as a matter of law that the lien of petitioner was valid, would they not have then to consider the peculiar position of wage claimants in Pennsylvania, whose rights (in general) *are ahead of those of an execution creditor?* These wage claimants here, under the Pennsylvania law, would probably have been entitled, each, to priority to the limit of $200.00, *ahead of the execution creditor,* who is the petitioner herein, if the proceedings related to a distribution in the State Court. See Pennsylvania Statute of 1891, P. L. 54 (*West's Digest,* Section 21488 *et seq.,* Page 17 of this Brief). True it is that in Pennsylvania the wage claimant must give notice of his claim in writing to the Sheriff "at any time before the actual sale of the property levied upon."—see *West's Digest,* Section 21489, Page 18 of this Brief. In the case at bar, the Sheriff never went to sale and, therefore, the time limit within which these wage claimants could have filed with him priority claims in the execution proceeding, was never reached.

Is it conceivable, we ask, that this petitoner, bringing a lien from the state court to the bankruptcy court and claiming under that lien, would be permitted, in the bankruptcy court to obtain therefrom more money than he would have obtained if he had been allowed to assert and collect on his lien in the state court? And this, to the detriment of labor claimants, who are favorites of the law?

The only answer which the petitioner herein has made to this proposition appears at Page 24 of his Brief. And the attention of the Court is respectfully called to the following: that in that answer—hereinafter quoted—petitioner concedes that under the Pennsylvania law, our wage claimants would have had priority claims to the amount of $200.00 each, ahead of his execution, if

the proceeding had been continued in the state court. His answer to our proposition, at Page 24 of his Brief, is as follows:

> "True it is under Pennsylvania law the wage claimants would have had a priority claim to the amount of $200 each, ahead of the execution creditor if the proceeding had been maintained in the state court. The wage claimants were the parties who removed the proceedings into the bankruptcy courts, they were the petitioners for the involuntary bankruptcy against the debtor. They could have perfected their right in the state court before filing the involuntary petition in bankruptcy by the filing of their claims with the sheriff or receiver. This they did not choose to do and now have no ground for complaint."

It is with regret that we are obliged to suggest that in the part of his argument above quoted, petitioner, instead of printing the original bankruptcy petition as part of his record herein, has found it advisable to step outside of the printed record, and thus to gather facts in a manner that is highly inaccurate, although, no doubt, intended in good faith. Unless our recollection is quite wrong, his foregoing quotation is erroneous in part. There are (R. 22) seventeen priority wage claimants. The bankruptcy statute requires but three creditors to file a bankruptcy petition and three of these wage claimants—and only three—were parties to the creditors' petition in bankruptcy; and those three (represented by undersigned counsel) were petitioners, not in their capacity as priority claimants, but as general creditors having claims above and in addition to the particular priority claims involved in this issue here. And, aside from those inaccuracies in fact may we suggest that if this theory of estoppel as to the seventeen prior-

ity wage claimants aforesaid (represented by the undersigned counsel) now advanced by petitioner, had any legal merit, should he not have asserted it—by proper showing on the printed record—in the earlier stages of this proceeding? And further, we deny that even if the statements of fact in the foregoing quotation were correct, there could be any legal merit to the conclusion which he reaches thereby, and for which he cites no precedent or authority.

We respectfully submit that the decree of the Circuit Court of Appeals for the Third Circuit should be approved.

Respectfully submitted,

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STATUTES.

Section 47 (a) (2) of the Bankruptcy Statute is as follows:

"Sec. 47. Duties of trustees—(a) Trustees shall respectively * * * (2) collect and reduce to money the property of the estate for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied (as amended June 25, 1910)."

Section 67 (f) of the Bankruptcy Statute is as follows:

"Sec. 67. Liens—(f) All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the

benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: PROVIDED, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

The Pennsylvania Statute of 1891, P. L. 54 (*West Digest, Pa.*, Section 21488, Section 21489) includes the following:

"S. 21488. Claim for wages a lien—All moneys that may be due or hereafter become due for labor and services rendered by any miner or mechanic, servant girl at hotels, boarding houses, restaurants or in private families, or any other servant and helper in and about said houses of entertainment and private families, porter, hostler or any other person employed in and about livery stables or hotels, laundryman or wasner woman, seamster or seamstress employed by merchant tailors or by any other person, milliner, dressmaker, clothier, shirtmaker or clerk employed in stores or elsewhere, hand laborer, including farm laborer or any other kind of laborer, printer, apprentice, and all other tradesmen hired for wages or salary from any person or persons, chartered company, joint-stock company, limited partnership or other partnership, either as owner, lessee, contractor or under-owner whether at so much per diem or otherwise, for any period not exceeding six months preceding the sale or transfer of the real or personal property, works,

mines, manufactories or business or other property connected therewith in carrying on the sale of said person or persons, chartered company, joint-stock company, limited partnership or other partnership, by execution or otherwise, on account of the death or insolvency of such employer or employers, shall be a lien upon said real or personal property, mine, manufactory, business or other property in and about, or used in carrying on said business or in connection therewith, to the extent of the interest of such employer or employers in said property, and shall be preferred and first paid out of the proceeds of the sale of such real and personal property, mine, manufactory, business or other property as aforesaid; Provided however, That the claim thus preferred shall not exceed two hundred dollars; and Provided further, That this act shall not be so construed as to impair contracts existing, or liens of record vested prior to its passage; and Provided further, That no such claim shall be a lien upon any real estate, unless the same be filed in the prothonotary's office of the county in which such real estate is situated, within three months after the same becomes due and owing, in the same manner as mechanics' liens are now filed."

"S. 21489. Claimants to give notice to officers —In all cases of executions, landlord's warrants, attachments and writs of a similar nature hereafter to be issued against any person or persons, or chartered company, engaged as before mentioned, it shall be lawful for such miners, laborers, mechanics or clerks, to give notice in writing of their claim or claims, and the amount thereof, to the officers executing either of such writs, at any time before the actual sale or the property levied on; and such of-

ficers shall pay to such miners, laborers, mechanics and clerks, out of the proceeds of sale, the amount each is justly and legally entitled to receive, not exceeding two hundred dollars."